Supreme Court, U.S.
FILED
AUG 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2057

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

against

THE STATE BOARD OF EQUALIZATION AND ASSESSMENT, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether special franchise property constitutes a valid separate classification under the Real Property Tax Law of the State of New York and whether such distinction between special franchise property and ordinary real property is legislatively permissible in the taxing structure.

2. Whether the use of the State Equalization rate which is made legally applicable to some 30 different State and municipal functions deprives the appellant of equal protection of the laws or due process of law when applied to special franchise assessments.

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MOTION TO DISMISS OR AFFIRM

Relief Requested

This Court should dismiss the appeal on the ground that it does not present a substantial federal question. Alternatively, this Court should affirm for the reasons stated by the courts below.

Preliminary Statement

As this brief is begun, we have received a draft of a brief on behalf of State Board of Equalization and Assessment ("State Board"). We find the counter statement of the case entirely sufficient for our purpose and we have no disagreement with the arguments made in that brief.

We are also generally aware of the positions taken by New York City and the other municipalities and, based on long familiarity with these proceedings, believe that we are in substantial agreement with those arguments.

ARGUMENT

POINT I

The classification of special franchise property as distinguished from other real property is rationally related to the achievement of a valid legislative state purpose.

It is well established that in the field of taxation, the Legislature is "not required to resort to close distinction or to maintain a precise scientific uniformity with reference to composition, use or value" (*Allied Stores v. Bowers*, 358 U.S. 522, 527; *Trump v. Chu*, 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971 (1985), app. dismissed ____ U.S. ____ 88 L.Ed.2d 250.

The trial court held that petitioner was unable to demonstrate that there was no rational basis for the classification, and also held that there was no basis for the argument that no differences existed that would justify differential treatment (JS A-17, 18). In fact, the court enumerated the numerous differences between special franchise property and normal real property set forth in the Real Property Tax Law (JS A-18).

The history of development of special franchise assessment shows clearly the creation of a special class, based on the creation of a new type of real property with unique characteristics. *Metropolitan Street Railway Co. v. State Board of Equalization & Assessment*, 174 N.Y. 417, 67 N.E. 69 (1903), aff'd 199 U.S. 1 (1905).

By 1949, the government of the State of New York came to the conclusion that remedial measures were necessary to cure the weaknesses in the existing assessment scheme. Two major areas presented themselves; (1) special franchises; (2) equalization. In 1949, a special temporary commission was created to be concerned with the application of equalization rates. See *Matter of Town of Smithtown v. Moore*, 11 N.Y.2d 238, 228 N.Y.S.2d 657, 183 N.E. 66 (1962).

By 1953, a number of measures had been introduced into the Senate of the State of New York, namely, § 2703, § 3228, § 3227 and INT 2557. Among the legislative documents dealing with these measures is the memorandum with respect to INT 2557. In this comment the writer clearly delineates the classification of special franchise property (Legislative Jacket).

> "1. Special franchise property continues as a special class of real property. For more than fifty years it has been treated as a special class of property and it has been assessed differently than other real estate. It is the only class of privately owned property located in public places which is legally recognized, and it is the only type of real estate which includes an intangible element, namely, the right to occupy a public place."

The memorandum of the then Attorney General of the State of New York accompanying the proposed legislation stated with respect to the proposed measures:

> "The essential provision of the bill as to assessment of special franchises is contained in Section 45 and is to the effect that such assessment shall be fixed by the Tax Commission annually and the latest equalization rates applied thereto, with the exception that any portion of the special franchise property which was assessed for the year 1953 shall thereafter have applied to it the 1953 state equalization rates. The bill deletes the requirements of 'full' valuation and equalization in assessment of such property."

The same law which created the new system of assessment of special franchises also promulgated new provisions for the determination of state equalization rates. In the years that followed the 1953 enactments, state equalization rates were attacked in a few cases (see *Smithtown, supra*), but there was no attack on the special franchise provisions. The statement of then Attorney General Goldstein that the assessment of

special franchises is not equalized with other property was effective and was carried out. An end came to the numerous actions of utilities litigating the special franchise assessments under the laws existing up to the 1953 amendment. From that time until 1974 there was practically no litigation with respect to special franchise assessments.

The equalization remedies did not follow quite the same route. Efforts were made to provide that the state equalization rates could be used for the purpose of determining the equalization factor in the litigation of ordinary real property assessments. Because of the newness of the equalization procedure, the lack of training, and the lack of well-developed discipline, the courts were unwilling to accept the state equalization rate as the factor to be applied under Section 720 of the Real Property Tax Law (RPTL) for the purpose of determining the proper equalization rate in an assessment proceeding. Thus, in *Yaras v. Kinnaw*, 303 N.Y. 224, 101 N.E.2d 474, and *Matter of Wolf v. Assessors of Town of Hanover*, 308 N.Y. 416, 126 N.E.2d 537, and in *Matter of O'Brien v. Assessor, Town of Mamaroneck*, 20 N.Y.2d 587, 285 N.Y.S.2d 843, 232 N.E.2d 844, the New York Court of Appeals rejected the state equalization rates as a single device to determine the rate to be applied in normal real property assessment litigation, mainly because the state had not established the basis for their reliability.

It was not until *Guth v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367, 315 N.E. 441 (1974) that respectability came to the state equalization rates. By this time the State Board had developed procedures and techniques for measuring in each locality the relationship of assessed value to full value of the property. In *Guth* and in *860 Executive Towers v. Assessor, County of Nassau*, 53 A.D.2d 463, 385 N.Y.S.2d 604 (2d Dep't., 1976), *aff'd sub nom. Matter of Pierre Pellaton Apts. v. Board of Assessors, County of Nassau*, 43 N.Y.2d 769, 401 N.Y.S.2d 1013, 572 N.E. 801 (1977), the courts pointed to the standards that had been developed by the State Board and that this was the most efficient and effective method of providing equalization rates. (34 N.Y.2d 440, 450).

A. The Determinations of the Court Below are Founded on the Long Involved History of Special Franchise Taxation.

The first special franchise tax act was passed by the New York Legislature in 1899. For half a century thereafter the implementation of this law was a thorn in the sides of the assessors, administrators and the courts. Initially, the problems revolved about the legality and constitutionality of the legislation, namely, was this the taxing of personal property or real property; then it turned to the question of the application of the equalization rate during the time when substantially all assessments in the State of New York were made on a fractional basis. In this period the special franchise assessment was made by the Tax Commission of the State of New York and the equalization rates were determined by each municipality up to 1911 on the basis of the relationship of assessments to full value. From 1911 on the equalization process for special franchises only was carved out by the State Board or the State Tax Commission. The problems involved are sketched as of the beginning of the period in *Metropolitan Street Railway, supra,* and as of the end of the period in the *Staten Island Edison* cases.*

B. The Real Property Tax Law Definitions of Real Property Show the Special Classification for Utilities and Special Franchises.

Appellant's argument that there may not properly be any difference between the treatment of special franchise property and normal real property (JS 10) is specious in view of the numerous distinctions between these two types of property as set forth in the Real Property Tax Law,**

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* *In the Matter of Staten Island Edison Corp. v. Moore,* 6 A.D.2d 369, 177 N.Y.S.2d 129 (3d Dep't., 1958); *on remand* 37 Misc.2d 198, 238 N.Y.S.2d 443 (Sup. Ct., Albany Cty., 1961); *aff'd* 15 A.D.2d 983, 225 N.Y.S.2d 846 (3d Dep't., 1962), *aff'd* 12 N.Y.2d 846, 236 N.Y.S. 624, 187 N.E.2d 475 (1962).

** hereinafter referred to as "RPTL."

and as delineated in the decision of Special Term below (JS A-18).

Subdivision 12 of Section 102 of the Real Property Tax Law defines real property. Aside from the normal definitions of land and buildings (Section 102(12)(a) and Section 102(12) (b), the remainder of the section is concerned with the definition of utility property (Section 102(12)(c), (d), (3) and (f)) and special franchise property (Section 102(12)(d) and Section 102(17).

The definitions set forth in Section 102 reflect the concept that utilities are so substantially different from the normal industrial company that they are assessed on a different basis. Thus, telephone and telegraph lines, wires, poles and appurtenances are taxable as real estate, even to the extent of including the telephone instrument located in the user's office (*New York Telephone Co. v. Canough*, 264 A.D. 937, 36 N.Y.S.2d 263, aff'd 290 N.Y. 537, 49 N.E. 999). So, also, with respect to electrical central office equipment (*Application of New York Telephone Co. v. Ferris*, 257 A.D. 415, 13 N.Y.S.2d 359, *aff'd* 282 N.Y. 667, 26 N.E.2d 805). On the other hand, telephone lines used by a non-utility company are not taxable as real estate. *Quotron Systems, Inc. v. Irizarry*, 48 N.Y.2d 795, 423 N.Y.S.2d 923, 399 N.E.2d 953.

Obviously, public utilities cannot exist without crossing streets and their lines do not terminate at municipal or even state borders. Those facilities used on streets were considered personal property prior to the enactment of the special franchise law in 1899. That law did not change the property from personal property to real property. What it did was to hold that the special franchise rights constituted real property and that their value is measured by the value of the physical equipment plus an intangible element.

Over the span of commercial development of electric power, gas, telephones and railroads, a complete body of law has developed treating these situations as utility property. Such properties, for reasons not germane to the discussions here, have certain rights, privileges and liabilities not available to other

types of companies. Their separate classification for purposes of real property assessment has been an accomplished fact for at least three quarters of a century.

In including the classification of special franchises as real property, it is to be noted that RPTL, Section 300, provides that all real property shall be subject to real property taxation and that personal property, tangible or intangible, shall not be subject to *ad valorem* valuation.

It is fundamental that the Legislature may classify property for tax purposes in any manner it deems proper, and it is immaterial if such classification works even a flagrant unevenness. *Allied Stores v. Bowers,* 358 U.S. 522, 527; *Madden v. Kennedy,* 309 U.S. 83, 88; *Long Island Lighting Co. v. State Tax Commission,* 45 N.Y.2d 529, 535, 410 N.Y.S.2d 561, 382 N.E.2d 1337; *Trump v. Chu,* 65 N.Y.2d 20, 25, 489 N.Y.S.2d 455, 478 N.E.2d 971, app. dism. ____ U.S. ____, 88 L.Ed.2d 250; see *Matter of Grumman Corp. v. Board of Assessors,* 2 N.Y.2d 500, 507; 161 N.Y.S.2d 393, 141 N.E.2d 794.

The nature of a special franchise has been clearly defined in *Colonial Pipe Line Company v. SBEA,* 81 Misc.2d 696, 366 N.Y.S.2d 949, *aff'd* 51 A.D.2d 793, 380 N.Y.S.2d 64 (2d Dep't., 1976), *aff'd* 41 N.Y.2d 1057, 396 N.Y.S.2d 184, 364 N.E.2d 848, as "permanent occupation of public property" (81 Misc.2d 696, 699). Examination of the legislative history and the cases shows definitively that special franchise property has always been a class *sui generis*; its definition as real estate stems from the relationship of the special franchise property to taxable property, prior to the enactment of special franchise legislation.

Not only is special franchise property itself generically diffferent from all other real estate, but the intents of taxation are different in almost every respect:

(a) The method of valuation: special franchise property has been assessed since 1953 on a fractional basis; normal real property pursuant to Section 306 was assessed on a full value basis up to 1981 and since that time on a fractional or full value basis (RPTL Sec. 305). See *Hellerstein v. Assessor, Town of Islip,* 37 N.Y.2d 1, 371 N.Y.S.2d 388, 382 N.E.2d 279.

Up to the year 1983, RPTL 606 Par. 1 commenced with "notwithstanding the provisions of Section 306 of this chapter . . . " After the repeal of Section 306 and the promulgation of Section 305 setting forth various standards for assessments, the quoted words were deleted. (Subd. 1 L. 1983, c599, Section 5.) In 1984, to accommodate the provisions of Section 305 and Section 306, the quoted words were replaced, so that paragraph 1 of Section 606 now reads "notwithstanding the provisions of Section 305 of this chapter . . . " (Subd. 1. L. 1984, c473, Section 16.)

Contrary to the assertions of appellants that Section 305, Section 306 and Section 606 direct that special franchise property be taxed on the same basis as other real property (JS 11) is the fact that Section 305 prescribes different standards of assessments, one of which is full value and one of which is fractional value. However, the principle that has been maintained in the Real Property Tax Law is continued in the provisions of Section 606 that the assessments of special franchise property are to be made in a manner notwithstanding the provisions of Section 305. In ordinary English, "notwithstanding" means "different from," or "in spite of" (Webster).

(b) Since the assessment of usual real property is made at full value or at fractional value, that assessment does not reflect an equalization rate. However, pursuant to RPTL, Section 606, in assessing special franchises SBEA must apply the latest state equalization rate to the full value it has found.

(c) The equalization rate applied to special franchise property is not a single rate as is the case with respect to the judicial determination of equalization of ordinary property, but consists of two rates:

(1) For property existing in 1953 the equalization rate of that year; and

(ii) For property subsequently installed, the latest state equalization rate.

(d) Special franchise property has added to its value a factor for the intangible element, generally around 5%. The addition of such a value to normal real estate could result in the tax being invalid.

(e) Special franchise property generally belongs to utilities, which are monopolies in each area in which they operate. Consequently, there is no other property to be compared with utility property. The valuation of individual homes, and the application of an equalization rate applied thereto, to a mass of highly technical sophisticated machinery which is never bought or sold would produce a ridiculous result.

(f) RPTL Section 302 provides for the taxable status date of real property. Paragraphs one and two provide for the taxable status date of real property in cities, towns, villages and schools; paragraph three provides that exempt property acquired by a nonexempt person becomes taxable as of the date of sale. Paragraph four of Section 302 relates to special franchises only and commences with the same language as that used in Section 606; namely, "notwithstanding any other provisions of law." This section provides for a valuation date for special franchise property different from those used for normal property and for cities, towns, villages and schools. It was in the light of these provisions that the Supreme Court of the State of New York in this matter (Lowery, J., 120 Misc.2d 617, 621 (JS-A18)) held that the evidence was

> insufficient to demonstrate that Con Ed is denied equal protection of the law.

(g) The date for valuation of property is different in the case of special franchises and normal property. Special franchise property is valued on the basis of an inventory existing at December 31st prior to the year in which the assessment is made and at values which go back one year earlier. (RPTL Section 302(4)) Normal property is valued *at* the tax status date in the particular community and its value is determined as of that particular date. (RPTL Section 302 (1, 2, 3)) It follows as a consequence that the application of equalization rates based on values later than the valuation date will produce disparate results. Because of the anomalies and contradictions that existed and could exist, the Legislature provided in RPTL, Section 606, for the application of the latest state equalization rate.

(h) Special franchise taxpayers have a right to a refund for other franchise fees paid by them. Nowhere is there any similar provision with respect to ordinary real estate. See *Matter of Brooklyn Union Gas Co. v. City of New York,* 56 N.Y.2d 881, 453 N.Y.S.2d 398, 438 N.E.2d 1113.

(i) All normal real estate is assessed by the local assessors. Special franchise property is assessed by the State. The reason for this is shown in *People ex rel. Metropolitan Street Railway v. Tax Commissioner,* 174 N.Y. 417, 438, on the principle that the property was so complex (even in 1899) as to require special franchise faculties to determine its value.

(j) The time for filing a petition to review is 60 days in the case of special franchises as against 30 days in the case of normal real estate.

(k) There is no provision in the case of special franchises for the petitioner to serve upon the respondent a demand for admission of the equalization rate. In fact, Section 716 which provides for this procedure with respect to ordinary real estate excepts special franchise assessments from that arrangement. This means that the legislature either wanted to deprive the petitioner of the right to agree upon an equalization rate in special franchise proceedings, or, as is more likely, indicated that there was no question to be raised because of the provisions of § 606 and the remaining provision of Title 2 of Article 7.

There is no basis for appellant's contention that all property, special franchise and ordinary, is to bear the same equalization rate despite differences in date of valuation, date of ownership and years involved, and differences in the nature of the property. As stated by the New York Court of Appeals in *Shandaken v. SBEA,* 63 N.Y.2d 442, 447, 483 N.Y.S.2d 161, 472 N.E.2d 989, the legislature has the authority to invest in the State Board the authority to determine valuation as well as to assure conformity with the equalization rule.

POINT II

The use of equalization rates to determine value is not limited to real property assessment.

The State Equalization Rate is not a single specific taxing factor. It is applied to about 30 vitally important governmental purposes. (*Matter of Smithtown v. Moore,* 11 N.Y.2d 238, 243, 228 N.Y.S.2d 657, 183 N.E.2d 66)

Among these function are state aid, borrowing power of municipalities, allocation of taxes between municipalities, determination of full value for county assessments, and rent control. These rates primarily affect municipalities and because of the varied uses, a beneficial rate for taxing may be disadvantageous from the viewpoint of borrowing power. See *Mt. Kisco v. SBEA,* 64 N.Y.2d 950, 488 N.Y.S.2d, 640, 477 N.E.2d 1094 (1985).

In cases involving the determination of value for the purpose of rent control, the courts have sustained the application of an equalization rate which produced different values in different places and not the current rate. The relevance of these cases to an assessment situation is that in both cases the court is concerned with a determination of value. In the case of rent control, the determination of value dictates how much an owner of real property may earn on his investment; in the case of taxation, the impact on the owner is smaller, the question being how much he has to pay in the way of taxes.

In *Matter of Hartley Holding Corp. v. Gabel,* 13 N.Y.2d 306, 240 N.Y.S.2d 976, 191 N.E.2d 457, the court upheld New York City rent control laws where the rental was based upon "value." "Value" was defined as value in effect at the time the application is filed. At the same time, the state rent control laws were not based upon assessed value but "equalized" assessment values, using an equalization rate ten years old. It was appellant's unsuccessful argument in that case that there was constitutional infringement when it could not use a valuation based on the assessed value of its property as equalized and adjusted upward to or toward "actual" value.

In *Bucho Holding Co. v. State Rent Commission*, 11 N.Y.2d 469, 230 N.Y.S.2d 977, 184 N.E.2d 569, the court upheld the constitutionality of the state rent control law where the value for rent control purposes was the equalized assessed valuation of the property. The Court dealt with the fact that from 1957 to 1961, equalization rates of 1954 were employed in computing the value of property for rent control. Beginning in July 1961, however, new legislation was applied which discontinued the use of the 1954 rate and provided that assessed value be adjusted by the "most recent" equalization rate available.

It is noteworthy that the "most recent equalization rate" available enacted by the Legislature in 1961 is almost the same term as that used in Section 606 of the Real Property Tax Law which provides for the use of the latest equalization rate.

In the rent control cases, just as in this case, opponents of the legislation argued unsuccessfully that the use of the latest state equalization rate would be unconstitutional, would violate due process of law and would constitute a denial of equal protection of the law. The courts in the rent control cases, as shown above, have held that the use of an earlier equalization rate instead of the current rate did not make the statute unconstitutional despite the disparities in values.

These cases show clearly that where there is an appropriate basis for classification, resultant disparities do not invade the constitutional guarantees of due process and equal protection and that in the areas of taxation the legislature possesses the greatest freedom in classification. *Matter of Long Island Lighting Co. v. State Tax Commission*, 45 N.Y.2d 529.

POINT III

Appellant's due process argument grounded in retroactivity is without merit.

A. Procedural statutes may be applied to pending proceedings.

The general proposition is clear that statutes establishing or changing procedure, rather than substantive law, can properly be applied to regulate the conduct of actions and proceedings

pending at the time of their enactment. The first, or usual question as to coverage of such a statute is whether the legislative intention is made clear to apply the provisions to pending cases (if so, perfectly legitimate in principle), or whether the provisions are to be limited to the regulation of *future* litigation. *Simonson v. International Bank,* 14 N.Y.2d 281, 289, 251 N.Y.S.2d 433, 200 N.E.2d 427 (1964); *Matter of Berkowitz v. Arbib & Houlberg,* 230 N.Y. 261, 270 (1921); *Lazarus v. Metropolitan Elevated Ry. Co.,* 145 N.Y. 581, 585, 40 N.E. 240 (1895); 4 N.Y. Jur. 2d 501 §400 (1980).

The opinion of Justice Lazer for the "plurality" of the Second Department in *Matter of Slewett & Farber v. Board of Assessors of Nassau County,* 80 A.D.2d 186, 199-201, 213, 214 (2d Dep't 1981), *mod.,* 54 N.Y.2d 547 (1982), contains a succinct and well-documented discussion of retroactivity in general and procedural statutes in particular. Retroactivity generally is discussed at 80 A.D.2d 199-201; pages 212-213 cover the normality of a legislature's retroactive amendment of procedural statutes; and pages 213-214 set forth some special due process considerations with respect to the latter.

RPTL §744 as a whole is plainly a procedural statute. §744(1) in particular is no less plainly procedural, and the 1982 amendment to §744(1) is of the same, appropriate character. The general subject matter of §744 refers to "action by the court" in reviewing special franchise proceedings, and sections 2-5 are akin; subdivision 2 covers pleadings and objections to them; subdivision 3, appeals and stays; subdivision 4, appointment and use of extraordinary terms of the Supreme Court to hear cases; and subdivision 5, the effect of a new or corrected assessment by the court.

Subdivision 1 of §744 concerns the court's taking evidence on review of a special franchise assessment or appointing a referee to take evidence and determine the proceeding. Before the 1982 amendment, the rest of subdivision 1 concerned, and still concerns changing the place of trial to the county where the special franchise is located. Since July of 1982, the second sentence of 744(1) has stated: "Notwithstanding any provisions

of this article to the contrary, evidence on the issue of whether a special franchise assessment is unequal shall be limited to the state equalization rate or special equalization rate used in determining the final special franchise assessment under review, and such equalization rate or special equalization rate shall be binding and conclusive on the parties upon any such issue." The characterization of the amendment and the entire section as procedural seems entirely justified.

Further, the legislation limiting, controlling or defining the only evidence of ratio to be permitted in any case alleging defective ratio used for a special franchise assessment is obviously corrective, or curative legislation (263). This is recognized by all as the legislative effort to change the interpretation of permissible procedure reflected in the decision of this Court in *Matter of Consolidated Edison Co. v. State Board of Equalization and Assessment,* 53 N.Y.2d 975, 441 N.Y.S.2d 669, 424 N.E.2d 556 (1981), upholding the refusal of the Appellate Division to grant summary judgment against Con Edison to the extent that Con Edison proposed to prove a different ratio entirely by massive proof of sales to make a case of inequality in each jurisdiction at issue.

Curative statutes which undo or attempt to undo what a legislature perceives as a mistaken application of statutory law are a separate, self-sufficient category of proper retroactive application. They are treated at some length in a much-cited law review article on the main subject: Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 Harvard Law Review 692, 703-6, 721-2 (1960). Again, even while Judge Keating argued strongly for the majority against validation of retroactive application in *Matter of Chyrsler Properties v. Morris,* 23 N.Y.2d 515, 297 N.Y.S.2d 723, 245 N.E.2d 395 (1969), he was careful to cite the leading case of *Paramino Lumber Co. v. Marshall,* 309 U.S. 370 (1940), as to the recognized right of a legislature to "cure an obvious defect in its legislation" (23 N.Y.2d at 520).

The object of the Legislature to cover the provisions which needed correction in order to limit the new evidentiary provisions on proof of ratio to special franchise cases alone—i.e.,

carrying out the State Board's routine establishment everywhere of equalization rates for all the multitude of purposes under RPTL §1202, and the *mandatory* use of such state rates with the "full values" found for special franchise assessment under RPTL §606—is clear from the avoidance of any linkage with the much-amended RPTL §720 for Article 7 trials or evidentiary purposes generally. Here we see enactment of an amendment of the section on special franchises alone, i.e., RPTL §744, by way of §744(1).

We do not criticize anyone's reference to the standard of "vested rights" to signify something of which a party cannot properly be deprived by retroactive legislation. This is a perfectly good concept and description for due process purposes, or for marking the point where legislative action runs the risk of arrogating the function of the judicial branch. We do not minimize, either, the idea of studying the importance of public and private interests at stake in any intended application of new statutory law to pending cases. We see the real issue on this appeal, however, as being whether the Legislature is to be regarded as improperly interfering with the judicial function in making §744(1) applicable to pending (pre-1982) Con Edison proceedings after the 1980-81 denial of an order for summary judgment.

This issue, in addition to the fatal characterization (inapplicable here) of "procedural" legislative action as a disguised substantive enactment, or a deprivation of *all* judicial remedies to a litigant, is well covered in the analytical, plurality opinion of Justice Lazer in the *Slewett & Farber* case (*supra* at 80 A.D.2d 218-22). The discussion, in the end, comes down to whether the Legislature has gone beyond its proper sphere and interfered with or encroached on the judicial function in changing the evidentiary provisions for proving claims of unequal assessment of special franchises. The real issue and the one recognized in *Slewett* is that there can be no retroactive application to a judgment. In this case, there was no final judgment, thereby disposing of the retroactivity argument.

B. Retroactive application of a procedural statute is valid when no prior judgment is affected.

New York authorities from 1981 to date involving the Real Property Tax law show that amendments of a procedural statute like RPTL §744(1) may properly be and will be applied to pending proceedings in which there has not been a prior judgment.

The next three cases discussed below, all decided by the Court of Appeals in 1982, were concerned, for our purposes, with the various changes to RPTL §720, as enacted in 1979 and 1981, with respect to proof of inequality in proceedings on assessments of ordinary real property. Two more cases on § 720 in the Second Department follow, showing the Second Department following the principles of the three main cases in 1983 and 1984 as to application of the procedural provisions. Two final cases in 1984 and 1985, also in the Second Department, show very well the clear-cut response to a legislative "correction" of a prior judicial interpretation, with no substantial question of valid retroactively where no judgment has intervened.

The opinion of the Appellate Division, Third Department, which was adopted by the Court of Appeals disposes of the retroactivity arguments posed by appellant. In so doing, the court pointed out (JS A-11) that *Slewett & Farber v. Board of Assessors**, relied on by appellant (JS 10, 15) holds that retroactive legislation does not present a due process issue unless a final determination has been made by the judiciary. As the appellate court here found, no such final determination had been made in this case (JS A-11).

In *Matter of Colt Industries v. Finance Administrator N.Y. City* and *Matter of Equitable Life Assurance Society of the U.S. v. Same*, 54 N.Y.2d 533, 446 N.Y.S.2d 237, 430 N.E.2d 1290 (1982), decided the same day as *Slewett & Farber*, the Court of Appeals made clear how important the interlocutory judgment was in *Slewett & Farber*—thereby preventing even a procedural statute from being applied, *as interpreted*, to affect the result

* 80 A.D.2d 186, 199, 201, 438 N.Y.S.2d 544 (2d Dep't 1981), *modified* 54 N.Y. 547, 446 N.Y.S.2d 241 (1982).

where such an important judicial determination has intervened (54 N.Y.2d 543).

Here again the December 1981 amendment restricting proof of State rates was involved. The applicability of the 1981 version of §720(3) to the hearings to be held in the actions was firmly declared, on the basis of finding a clear-cut procedural statute applying to all proceedings pending on December 3, 1981. The right of the Legislature to subject all pending proceedings (i.e., all which did not have a fillip like the pre-existing, interlocutory judgment in *Slewett & Farber*) to a restriction of proof on issues of inequality is treated as absolutely clear and just about beyond argument. The *per curiam* opinion also took up and rather swiftly disposed of due process and equal protection arguments against forbidding proof of ratio by State equalization rates in New York City and Nassau County (54 N.Y.2d 543-45).

In *Matter of Canigiani v. Board of Assessors of Nassau County*, 98 A.D.2d 233, 471 N.Y.S.2d 951 (2d Dep't 1983), petitioner Canigiani obtained a ruling at Special Term, Nassau County, in April 1981 that the 1979 amendment to §720(3) was unconstitutional in preventing his use of the state rate to present an inequality case against his tax assessments, resulting in a decision of April 8, 1981, accepting the use of the State rates and reducing the assessments. After the decision of the Appellate Division in the *Slewett & Farber* case in April 1981 [upholding the facial validity of §720(3)], the *Canigiani* decision was vacated at Special Term but, at the same time, Canigiani was permitted to reopen his case for the purpose of proving the elimination of his "State rate" evidence to be unconstitutional under his theory that the proof of inequality by evidence of all sales in the area was illusory and would be unconstitutional as prohibitively expensive. In June 1981, Special Term held that the petitioner had demonstrated, in a trial, that the proof of an inequality case by the permitted evidence of sales would be prohibitively expensive. After further work on validation of the State rates as applicable to the premises, through the summer of 1981, Canigiani obtained a judgment on October 20, 1981, at Special Term holding that (a) Subsection 3 of §720 was unconstitutional insofar as it prohibited Canigiani's use of the

State rate; (b) the prior decision of April 8, 1981, was reinstated; (c) Canigiani's assessments for the tax years 1974/5 through 1980/1 were reduced.

The 1979 amendments, of course, expired on October 30, 1981, and the new statutory prohibition of the use of State rates in Nassau County and New York City took effect on December 3, 1981. After the Court of Appeals decision in *Slewett & Farber* on January 4, 1982 (*supra*, pp. 13-15), the appeal of the assessors in *Canigiani* came up in the Appellate Division. That court:

> 1. Did not address Special Term's invalidation of the 1979 version of §720(3), as predicated on the prohibitive expense of Canigiani's proof by "all sales";
>
> 2. Refused to rule on the validity of Special Term's reopening the case for trial of the constitutional issue of prohibitive expense;
>
> 3. Held that the old, 1979 version of §720(3), as an expired statute, had no application to the case as it stood now, i.e., after the Court of Appeals decision in *Slewett & Farber*;
>
> 4. Held that the new §720(3) of December 1981 had no application because, while it would ordinarily have applied to an action pending on December 3, 1981, it was inapplicable to the Canigiani case in that a prior, *final* judgment (now upheld as proper) of October 1981 was entered before the amendment was enacted.

Another certiorari petitioner named Raddock had also obtained an order for summary judgment on various theories of collateral estoppel based on invalidity of the restriction of proof of inequality by State rates. He had moved for summary judgment only in *May 1982*, however, and obtained his order for summary judgment in September 1982. With nothing of any more validity produced as to compliance with the 1981 amendments, this petitioner was fully covered by and had no

basis to ignore the prohibition of §720(3), as amended and effective on December 3, 1981. No prior judgment protected Raddock's position and, of course, he was in complete evasion of the applicable provisions of December 1981. His judgment of September 1982 was therefore reversed.

Matter of River House-Bronxville v. Gallaway, 100 A.D.2d 970, 475 N.Y.S.2d 291 (2d Dep't 1984) involved the application of procedural statutes to pending actions of several years' standing in *the absence of an intervening judgment.*

The case included two trials on the 1976-to-1978 tax assessments of a cooperative apartment building in Bronxville. On a prior trial before Justice Sullivan in Supreme Court, Westchester County, the court had considered the testimony of one expert under a "market" approach to valuation of a cooperative apartment (based roughly on the sum of the fair values of the various units for sale), as against an "income approach" of an opposing expert whereby the property was treated like a single, income-producing rental apartment house.

On the perception that Real Property Law §339-y and the case law at the time required only *condominiums* to be valued as if they made up a single rental apartment with an income stream, Justice Sullivan gave credence to the market valuation at a total price for all of the units of a cooperative, and dismissed the petitions. *Matter of River House-Bronxville v. Hoffman,* 101 Misc.2d 422, 421 N.Y.S.2d 161 (Sup. Ct. Westchester 1979), rev. 79 A.D.2d 990, 434 N.Y.S.2d 465. The Appellate Division agreed basically with Justice Sullivan and favored the use of market data in lieu of the income approach for the cooperatives. It also found no requirement of law to use only the income approach. It nevertheless reversed the judgment and directed a new trial for the purpose of developing evidence on certain "discount" factors thought to be applicable and also to find the limiting factor of "reproduction value less depreciation." 79 A.D.2d 990, 991 (1981); see also *Matter of 200 Country Club Associates v. Board of Assessors of Nassau County,* 83 A.D.2d 637, 441 N.Y.S.2d 705 (2d Dep't 1981), wherein the Appellate Division also upheld the market data approach for the valuation of cooperative apartments.

After the new hearings before Justice Sullivan in October 1981, but before his decision came down, the Legislature enacted Real Property Tax Law §581, effective December 3, 1981, requiring property owned or leased by a cooperative corporation to be assessed at no more than the value to be found if it were not owned or leased by a cooperative corporation or "on a condominium basis." There was no doubt whatever as to the legislative purpose in enacting the new RPTL §581. A memorandum of the S.B.E.A. to the Legislature in the bill jacket calls for an assessment not exceeding the sum that would have been stated in the absence of cooperative or condominium ownership. It is then said, in so many words, that the bill was "intended to reverse the trial court decision in *Matter of River House-Bronxville v. Gallaway*, 101 Misc.2d 422, and the Appellate Division (2d Dep't) holding in *Matter of 200 Country Club Associates*" (100 A.D.2d 973-4).

In determining the effect of the new statute, affecting his decision yet to be made, Justice Sullivan considered that there were no vested rights of the municipality in his 1979 determination because there was no *judgment* outstanding to prevent a new procedural statute from regulating the methodology to prove valuation of the subject property. Noting that valuation hearings were held after the Appellate Division reversal and before the enactment of §581, the controlling element was found by the trial court to be that no *judgment* was outstanding after the 1981 reversal, whereas the doctrine of the cases from *Slewett & Farber* through *Green* was that nothing less than an interlocutory judgment will prevent the introduction of changed procedural or evidentiary provisions, by passage of an original or amended statute, into a pending proceeding. The Appellate Division affirmed, adopting Justice Sullivan's rationale and many of his words (100 A.D.2d at 973).

It is readily apparent, of course, that nothing whatever is said in the reported case about judicial resistance toward the legislative disapproval of a statutory interpretation which underlies the new statute. Further, there is no surprise or resistance about applying a curative, procedural statute of December 1981 to the

trial procedures of tax proceedings of 1976 and thereafter, by way of judicial determinations of July 1982 at Special Term and April 1984 in the Appellate Division.

Matter of South Bay Development Corp. v. Board of Assessors of Nassau County, 108 A.D.2d 493, 489 N.Y.S.2d 762 (2d Dep't 1985), involved South Bay's certiorari case before Justice Farley for reduction of 1980 and 1981 assessments, mainly as to its 61-unit condominium apartments. Hearings were held in mid-1983—not only after the December 1981 enactment of RPTL §581 but between the decision of Justice Sullivan in the retried *River House* case and the affirmance by the Second Department discussed just above. The petitioner's expert relied on the income approach, for tactical purposes and under the stated procedure for condominium properties per §581, but Nassau County contested the income approach by way of market valuation under a sophisticated "discounted gross sellout" theory. Here Nassau's expert avoided the mere totaling of the gross sales prices established for the separate apartments and applied various discounting factors to bring the value below the maximum of possible valuation under RCNLD.

In a decision which was not incorporated into a judgment until August 1983 (by then the second Appellate Division decision in *River House* had come down), Justice Farley agreed with Justice Sullivan's subjection of the recently taken proof to the December 1981 requirements of §581—i.e., a retrospective following of the legislative intent to subject pending proceedings to the "income-only" requirement of §581 for condominiums and cooperatives. The trial court specifically rejected the argument that §581 created a new assessment standard only for *prospective* application, holding that the legislative objective of currently correcting, or curing other interpretations as to the proper proof to establish valuation was clear. He therefore applied §581, accepted the "income" appraisal of the petitioner's expert and reduced the assessments.

On appeal, Nassau County advanced arguments in support of the "discounted gross sellout" appraisals as consistent not

only with prior law but with the requirements of §581. This is discussed at some length and rejected in the decision for affirmance, but the part of the case of interest to us is the court's disposition of the final appellate argument that, if §581 prohibits the "discounted sellout" approach, the statutory prohibition of December 3, 1981, must be regarded as prospective only, so that it is not to be applied to certiorari proceedings brought or assessments made before the December 1981 date (108 A.D.2d 501).

The Appellate Division showed not the slightest disposition to retreat from its *River House* principle that "nothing short of an interlocutory determination" would have vested the respondent's rights as against such an evidentiary (procedural) statute as §581 (108 A.D.2d 508) whereas the South Bay trial did not begin until October 1982—nearly a year after the enactment of the statute. Against the articulation of South Bay's "discounted sellout" approach as a matter of "vested substantial legal rights," and not merely a choice of evidentiary routes to be followed which the Legislature might freely and properly "tinker with" thereafter, the Court had no hesitation in adhering to its second *River House* decision on retroactive application of §581 to tax proceedings pending on December 3, 1981 (even where a trial *precedes* the December 1981 date), without a preexisting decision and judgment. Here, of course, there was no part of a trial before the amendment of 1981 and the respondent was described as making the claim "in the very teeth" of the existing statute (108 A.D.2d 509).

Summary Comment on Authorities under This Point

Viewing together all the authorities under this heading, the demonstration of the cases seems clear: (a) the amendment of RPTL §744(1), no less than the 1979 and 1981 amendments of §720(3) and the 1981 enactment of RPTL §581, is an enactment of a clear-cut procedural portion of a statute; (b) there is no substantive element in the amended §744(1) by its very nature; and nothing in the passage of the legislation (to correct and undo a prior interpretation of Article 7 and §744 as permitting

proof of alleged inequality of ratio in special franchise proceedings by sales or sample parcels) which changes the characterization of this part, or all parts of §744 as procedural; (c) as a statute well within the familiar power of the Legislature to correct a departure from the legislative scheme for litigation of special franchise cases, the amended §744(1) would surely have been construed as applying to our "pending proceedings" and not merely regulating the conduct of litigation in the future, but the express application to proceedings commenced after January 1, 1973, and "not finally determined" on the effective date of July 22, 1982 (Laws of 1982, Ch. 714, §29) makes construction unnecessary; (d) the normal application of such a procedural statute with respect to prior assessments and pending proceedings is that it applies to all such proceedings which are not exempt or disclaimed from governance, but that it stops short at the point where any such proceeding has reached the point of an interlocutory judgment. The latter principle also serves as the demarcation of the area into which the legislature does not and should not intrude—that of trying to override a court interpretation which has reached the point of judicial declaration of (at least) an interlocutory judgment. In other words, the legislature should and does stop short of the point of "legislative *reversal*" of a judicial determination.

Based on these considerations, the New York courts have held: that courts are obligated to recognize and apply retroactive modifications of the law involved in pending litigation; that such retroactive legislation does not present a due process issue unless a final determination has been made by the judiciary; and that in the instant case no such final determination had been made. (JS A-11; A-18-20)

These considerations are not only applicable under New York law for the reasons set forth herein, but are equally applicable under federal law.

It is our understanding that the other appellees have more fully briefed the federal due process and equal protection questions and we rely on the arguments made in those briefs.

CONCLUSION

The appeal should be dismissed or the order below should be affirmed.

Dated: White Plains, New York
July 30, 1986

Respectfully submitted,

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